**JONG KA HIAP & 4 ORS.**

**v.**

**YONG SOI FAH (F)**

HIGH COURT BORNEO, KUCHING
TUAN RICHARD MALANJUM JC
[SUIT NO. KG 258 OF 1987]
27 MAY 1993

***LANDLORD & TENANT: Claim for possession and mesne profits - Plaintiffs father renting premises to defendant's father pursuant to oral agreement - Premises subsequently transferred to plaintiffs - Plaintiffs continuing to accept monthly rental from defendant after demise of defendant's father - Plaintiffs sending defendant notice to quit - Plaintiffs rejecting further rental payments - Defendant refusing to surrender possession - Whether a tenancy existed between the plaintiffs and defendant - Whether tenancy agreement properly determined - Whether notice to quit served - Whether defendant acquired right to protection under the Rent Control Ordinance - Whether defendant had accrued right to occupy arising from repairs to premises - Consideration of ss.162 & 163 Sarawak Land Code.***

***EVIDENCE: Admissibility of document exhibited in agreed bundle - Whether contents of document need be proved.***

The plaintiffs' father had entered into an oral agreement to rent the first floor (the premises) of his double storey building to the defendant's father at a monthly rental of RM100. The said property was acquired by the plaintiffs from their father in 1978 at which time the defendant was already a tenant. The plaintiffs continued to accept the same monthly rental from the defendant after the acquisition of the property until a notice to quit dated 12 June 1985 (the notice) was sent to the defendant. However it was unclear as to whether the notice and the covering letter were served. All further attempts by the defendant to make rental payments were rejected by the plaintiffs but the defendant refused to surrender possession of the premises and filed a counterclaim to the plaintiffs' action. The defendant submitted that the tenancy was unconditional and no duration was specified. After her father passed away in 1982 she continued to pay the same amount of rental and had undertaken repair works to the premises when needed on the basis of which she claimed the right to occupy. She also claimed protection under the Rent Control Ordinance. The defendant admitted receiving letters from the plaintiffs but could not remember if she was served the notice and covering letter.

The main issue before the Court was whether any tenancy agreement existing between the plaintiffs and defendant had been properly determined.

**Held:**

**[1]** It was common ground that even after the property was transferred to the plaintiffs the defendant continued to pay the monthly rental of RM100 to the plaintiffs. Thus at the very least there existed a monthly tenancy between the parties. Accordingly, for such type of tenancy a one month notice to quit was essential to be served on the defendant.

**[2]** The plaintiffs tendered the notice to quit and the covering letter in the course of the hearing but there was no proof that they were duly served on the defendant. Learned Counsel for the plaintiffs made reference to page 21 of the agreed bundle to show that the notice was received by the defendant but it was not referred to by any witnesses or the parties during the hearing. The learned Counsel for the defendant had no objection to the agreed bundle of documents being marked for their authenticity only but not the contents therein. As such it was incumbent upon the plaintiffs to ensure that the document on page 21 was properly admitted before any reliance could be put on it which they failed to do. Consequently, the said document could not be relied on to establish that the notice had in fact been received by the defendant. It followed that it was not established on a balance of probabilities that the tenancy between the parties had been properly determined. That being the case this action failed.

**[3]** On the question of the acquired right in relation to the Rent Control Ordinance (Cap. 86 Ordinance), the Rent Control (Repeal) Ordinance 1984 and s. 10(c) of the Interpretation Ordinance (Cap. 1) it was the Court's view that no right could be said to have been acquired if it did not exist when the 1984 Ordinance came into force. Such a right under Cap. 86 Ordinance would have accrued if the plaintiffs as landlords took any step to recover possession of the said premises before its repeal. In this case it was not disputed that this action was taken after the 1984 Ordinance came into force.

**[4]** As for the contention of accrued right to occupy arising from the repairs by the defendant to the premises, it could, in the Court's view be rebutted by the relevant provisions in ss. 162 & 163 of the Land Code which obliges a sublessee to keep in good and tenantable repair any land which includes by definition any building occupied by him. Accordingly the Court dismissed the defendant's counterclaim and the plaintiffs' action with costs to the defendant.

*[Plaintiffs' action dismissed with costs. Defendant's counterclaim dismissed].*

**Cases referred to:**
*Lee Ah Low v. Cheong Lip Keen & Anor. [1970] 1 MLJ 7* ***(refd)***
*Kong Chung Siew & 2 Ors. v. Ngui Kwong Yaw & 3 Ors. [1992] 4 CLJ 2013* ***(cit)***
*Chong Khee Sang v. Pang Ah Chee [1984] 1 MLJ 377* ***(foll)***
*Abdul Khader bin Shafie v. Low Yam Chai [1989] 2 MLJ 483* ***(cit)***
*Champion Motors (M) Ltd. v. Leong Siew Kwan [1968] 2 MLJ 31* ***(cit)***

**Legislation referred to:**
Interpretation Ordinance (Cap. 1), s. 10(c)
Sarawak Land Code, ss. 162 & 163
Rent Control Ordinance 1984
Rent Control Ordinance (Cap. 86) (Repeal)

**Other sources referred to:**
**Atkin's Court Forms**, Vol. 18, 2nd Edn., para 40
**Odgers on Pleading & Practice**, 20th Edn., p. 298

*For the plaintiffs - Anthony Phua; M/s. Yong & Co.*
*For the defendant - Ann Teo; M/s. Loa & Lim*

**JUDGMENT**

**Richard Malanjum JC:**

*A. The claim and the defence:*

In this action the plaintiffs are claiming for the following:

(i) possession of the whole of first floor of the building known as No. 15, India Street, Kuching Sarawak (hereinafter referred to as "the said premises") and described as Parcel 151, Section 24 Kuching Town Land District under Kuching Lease of State Land No. 1042 of 1937 (hereinafter referred to as "the property");
(ii) mesne profits at the rate of RM1,000 per month from 1 August 1985 until possession; and
(iii) costs.

The defendant is resisting the claim on the following grounds:

(a) paragraph 2 of the defence states, *inter alia*, "that it was an express/and or implied term of the original tenancy under which she entered into and continued possession of the said premises that in consideration of her effecting repairs at her own costs, she shall be able to occupy the said premises for so long as she required it for her business, provided she pays rental regularly... The plaintiffs, having full knowledge affirmed the above term and arrangement and is estopped from denying the same.";
(b) that the "notice to quit was invalid and of no effect and never determined the tenancy": paragraph 3 of the defence;
(c) that the Rent Control Ordinance has not been repealed and even if it has been repealed, the defendant is entitled to the continuous protection of the said Ordinance; and
(d) that there was no proof that the notice to quit had been duly served on the defendant.

*B. The plaintiffs' case:*

It is the plaintiffs' case that they are the registered co-proprietors of the property in which the said premises is situated. They acquired the property from their father in 1978. At the time of acquisition the defendant was already a tenant of the said premises. According to the father of the plaintiffs, Jong Tze Khian (PW1), he entered into an oral agreement in the absence of any witness with one Yong Yan Chee who was the father of the defendant. PW1 could not remember exactly the year but he said it was before 1985. He further stated that the terms of the agreement were that the said Yong Yan Chee would rent the said premises for RM100 per month and that he (PW1) would take back the said premises when his children have grown up. This witness also testified that the defendant moved into the said premises with her father.

Another witness Jong Ka Chin, (PW2), who is one of the plaintiffs, testified that the property has a two-storey building. The ground floor is currently rented at RM1,800 per month and the first floor is occupied by the defendant. He said that the defendant was paying RM100 per month before 1985. But in 1985 he instructed his

advocates to give a notice to quit to the defendant. This witness identified Ex.P1 as the letter which he said should have accompanied Ex.P2, the notice to quit dated 12 June 1985. He also said that the defendant attempted to pay the rental after the issuance of Ex.P2 including payments through the Kuching Tenants Association but they did not accept. Their rejection of the payments of rentals was communicated through their advocates as shown in Ex.P6, Ex.P7 and Ex.P8. Under cross-examination PW2 agreed that even after the transfer of the property to them the defendant continued to pay the rentals and he had gone personally a few times to collect them. This witness also stated that he did not know if Ex.P1 and Ex.P2 were personally served on the defendant as the matter was handled by their advocates. He agreed that whilst Ex.P1 had the marking of "AR Registered" no such marking appeared on Ex.P2.

On re-examination PW2 said that he received Ex.P1 and Ex.P2 but he could not remember if he received them together.

The plaintiffs next called PW3, Mr. Allen Chew, who is a Fellow of the Institution of Surveyors Malaysia. He testified that the estimated rental for the said premises in 1985 was RM1,000 taking into account repairs and renovations. But he agreed that his report, Ex.P9, did not indicate any repairs or renovations.

*C. The defendant's case:*

The defendant in her evidence testified that she moved into the said premises with her father in 1949. It was rented to her father for RM100 per month by PW1. She said that there was no other condition and the duration of the tenancy was not specified. After her father passed away in 1982 she continued to pay the same amount of rental up to 1985 or 1986. The defendant further testified that she had asked somebody to do repair works on the said premises, such as repairs on the roof which was leaking, the staircases and the plumbing. According to her she would carry out repair works when there was a need to do so.

When Ex.P1 and Ex.P2 were shown to her, the defendant said that she could not remember if she was served with them.

Under cross-examination the defendant maintained that she could not remember receiving Ex.P2. She also said that her mother passed away in 1990 and that she and her mother continued the tenancy after her father passed away.

Questioned by the Court the defendant replied that the said premises has been used both for business and residence since 1949. She also admitted receiving letters from the plaintiffs but did not know the contents. Neither did she know if they were Ex.P1 and Ex.P2.

*D. The Issues:*

It is a fundamental principle that to succeed a plaintiff must prove his case on a balance of probabilities. If he fails to prove any of the elements necessary to establish his case or that the defence has successfully cast doubt the action fails. I shall therefore consider this case on the basis of:

(a) whether the plaintiffs have proved their case; and
(b) if so, whether the issues raised by the defence as aforementioned have repelled the claim.

*Issue (a):*

For the plaintiffs to succeed in their claim for possession they must establish on a balance of probabilities that any tenancy agreement subsisting between them and the defendant has been properly determined and the defendant has refused to surrender possession of the said premises. Leaving aside the issue of the oral agreement concluded between PW1 and Yong Yan Chee over the said premises, it is common ground that even after the property was transferred from PW1 to the plaintiffs in 1978, the defendant continued to pay the monthly rental of RM100 to the plaintiffs. Thus, at the very least, there existed a monthly tenancy between the plaintiffs and the defendant. In the case of *Lee Ah Low v. Cheong Lip Keen & Anor*. [1970] 1 MLJ 7 FC, Ali FJ at page 11 G said this:

> ... The manner of payment of rent has always been the basis of consideration in the formulation of the principle stated in the English cases, which, undoubtedly led the learned trial Judge to come to the conclusion as he did in this case.

Accordingly for such a type of tenancy a one month notice to quit is essential to be served on the defendant. [See: *Kong Chung Siew & 2 Ors. v. Ngui Kwong Yaw & 3 Ors.* [1992] 4 CLJ 2013].

No doubt the plaintiffs tendered Ex.P1 and Ex.P2 in the course of the hearing. But they are not of much use if there is no proof that they were duly served on the defendant. With regret I must say that I find no evidence adduced indicating that copies of Ex.P1 and Ex.P2 had been duly served on the defendant. I note that Ex.P1 is endorsed with the words "AR Registered" but there was no document of any nature produced to show that the copy of Ex.P1 was sent and received by the defendant as it should have been in an "AR Registered" mail. As for Ex.P2 no indication how its copy was sent to the defendant as Ex.P1 makes no reference to it. Even PW2 could not recall if Ex.P1 and Ex.P2 were received together by him. Further, the defendant said that she could not recall receiving copies of Ex.P1 and Ex.P2.

In his submission learned Counsel for the plaintiffs made reference to page 21 of agreed bundle of documents (Ex.1) to show that Ex.P2 was received by the defendant. It is to be noted that page 21 of Ex.1 was not read nor referred to by any witnesses or the parties during the hearing. Anyway, I do not think I can rely on the document. This is because learned Counsel for the defendant made it very clear at the outset of the hearing that she has no objection to the agreed bundle of documents being marked for their authenticity only but not the contents therein. As such it was incumbent upon the plaintiffs to ensure that the document on page 21 of Ex.1 was properly admitted before any reliance could be put on it. Unfortunately they failed to do so. Consequently the said document as it stands cannot be relied to establish a point that Ex.P2 had in fact been received by the defendant.

In *Chong Khee Sang v. Pang Ah Chee* [1984] 1 MLJ 377 at p. 382 D, his Lordship Shanker J. said this:

> ... Certainly the law must be that once a document is included in an agreed bundle, it is no longer necessary to prove their existence or execution. Nor is it necessary to produce the original. But so far as the contents of the documents are concerned the truth of the same has still to be proved, in the absence of any specific admission of the facts therein contained.
>
> ... So whilst it is not necessary to prove the documents, it would still be necessary to prove the truth of the contents of the documents.
>
> ... Even where an agreed bundle is filed it will be noted that "in default of a special agreement, only such letters in the bundle as are actually read at the trial will be taken to be in evidence, and agreeing a bundle does not constitute an admission that all the letters contained in it are admissible in evidence." [See **Odgers on Pleading & Practice** 20th Edn. p. 298.]

I agree entirely with his Lordship's view.

[See also: *Abdul Khader bin Shafie v. Low Yam Chai* [1989] 2 MLJ 483 where his Lordship K.C. Vohrah J. made reference to para. 40, 18 **Atkin's Court Forms** (2nd Edn.)].

For the foregoing reason I can only conclude that the plaintiffs failed to prove on a balance of probabilities that copies of Ex.P1 and Ex.P2 had been duly served on the defendant. It follows therefore that it was not established on a balance of probabilities that the tenancy between the parties had been properly determined before the commencement of this action for possession of the said premises. And that being the case this action therefore fails.

[See: *Champion Motors (M) Ltd. v. Leong Siew Kwan* [1968] 2 MLJ 31].

*Issue (b):*

In view of the conclusion I have arrived at there is therefore no necessity for me to consider the other issues raised in the defence. Suffice to say very briefly in passing that on the question of acquired right in relation to the Rent Control Ordinance (Cap. 86 Ordinance), the Rent Control (Repeal) Ordinance 1984 (the 1984 Ordinance) and s. 10(c) of the Interpretation Ordinance (Cap. 1) it is my view that no right can be said to have been acquired if it did not exist when the 1984 Ordinance came into force. I think such a right under Cap. 86 Ordinance would have accrued if the plaintiffs as landlords took any step to recover possession of the said premises before its repeal. In this case however it is not in dispute that this action was taken after the 1984 Ordinance came into force.

[See: *Kong Chung Siew's* case *(supra)*]

As for the contention of accrued right to occupy arising from the repairs and renovation works by the defendant on the said premises it can, in my view, be rebutted by the relevant provisions in the Land Code in particular, ss. 162 and 163. These sections obliged a sublessee to keep in good and tenantable repair any land which includes by definition any building occupied by him.

*E. Conclusion:*

This action is therefore dismissed with costs to the defendant. As for the counterclaim of the defendant I do not think it is necessary for me to rule on it in view of the decision I have arrived at. Anyway I note that learned Counsel for the defendant did not appear to have pursued it judging from her conduct of the defence case. By reason of my views on Issue (b) aforesaid though very briefly, I would have no hesitation to dismiss the counterclaim.

**KIMDEN HOUSING DEVELOPMENT SDN. BHD. (IN LIQUIDATION)**

**v.**

**ASIA COMMERCIAL FINANCE (M) BERHAD**

HIGH COURT MALAYA, KUALA LUMPUR
TUAN RICHARD TALALLA J.
[CIVIL SUIT NO. D2-22-287-1992]
24 MAY 1994

***PRACTICE & PROCEDURE: Order 32 r.16 RHC - Consent order - Parties consenting to setting aside of judgment in default - Order drawn up - Order not in terms of consent but in terms of summons in chambers - Parties agreeing to amend under slip rule - Court inviting parties to act under O. 32 r. 16 RHC governed by Practice Direction No. 2 of 1989 - Saving of time and expense - Attendance of parties not required - Service of sealed summons not required.***

The plaintiff filed an action against the defendant for damages for breach of a financing agreement and subsequently entered judgment in default of appearance. The defendant applied by summons in chambers to set aside the judgment in default as well as the orders for renewal and amendment of the writ obtained by the plaintiff. At the hearing both parties consented to the judgment being set aside and the defendant accordingly applied for an order in terms of the consent. However, unknown to the parties the learned Senior Assistant Registrar (SAR) made an order in terms of the summons in chambers and not the consent. The draft order was also settled in terms of the summons in chambers and was sealed by the Court and served on the plaintiff's solicitors. The error was eventually raised by the plaintiff's solicitors at a hearing of the defendant's application to strike out the plaintiff's action. Both Counsel agreed to amend the order under the slip rule but was instead invited by the Court to act under O. 32 r. 16 of the Rules of the High Court 1980 (RHC) to save time and costs. A summons in chambers was issued and served on the defendant's solicitors who endorsed their consent on the draft order attached and returned it to the plaintiff's solicitors. Both Counsel appeared before the Judge in chambers on the summons.

**Held:**

**[1]** The very purpose of r. 16 had been defeated. Time and expense had not been saved. Rule 16 exists in order to obviate the necessity